United States District Court
Eastern District of Michigan

United States of America,

Plaintiff,

v.

Kwame M. Kilpatrick,

Defendant.
_____/

Hon. Nancy G. Edmunds

Criminal Case No. 10-20403
Civil Case No. 17-12171

Government's Response to Kilpatrick's Motion for Reconsideration and Motion for Recusal [R.648, R.649]

He that accuses all mankind of corruption ought to remember that he is sure to convict only one.

— Edmund Burke, Letter to the Sheriffs of Bristol

In Kwame Kilpatrick's view, the blame for his corruption convictions lies with everyone but him. He has never apologized, never accepted responsibility—never shown any remorse for extorting millions of dollars from Detroit city contractors. Instead, he has lashed out at every possible scapegoat: the government, the media, his attorneys, and, now, this Court.

But whether Kilpatrick seeks to disqualify the Court going forward, or instead just vacate his convictions, his latest accusations do not justify relief. Kilpatrick's disagreement with the Court's conflict-of-interest rulings is not a proper basis for recusal, especially now that the Sixth Circuit has agreed with those rulings. And even taking Kilpatrick's other unsworn accusations as true, the Court was permitted to send a congratulatory wedding card to Kilpatrick's attorney. Only "an intimate, personal relationship" requires recusal. *United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir. 1993). Sending a wedding card does not signify that kind of relationship.

The rest of Kilpatrick's untimely motion for reconsideration does not justify relief, either. Because Kilpatrick procedurally defaulted his *McDonnell* claims, and because there is no question that his extortion involved only "official acts," his case differs significantly from any cases where a defendant has obtained relief—or even a certificate of appealability—for preserved claims. And Kilpatrick's remaining arguments simply repeat the claims that this Court rejected in denying his § 2255 motion.

Kilpatrick's latest post-judgment motions should be denied.

Respectfully submitted,

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Dated: May 3, 2019

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Brief in Support of Government's Response to Kilpatrick's Motion for Reconsideration and Motion for Recusal [R.648, R.649]

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Issues Presented

I. Acquaintanceship—or even friendship—between a judge and a party's attorney does not mandate the judge's recusal under 28 U.S.C. § 455(a). Only "an intimate, personal relationship" does. Here, Kilpatrick alleges only that he is dissatisfied with the Court's rulings and that the Court once congratulated Kilpatrick's attorney with a wedding card. Does any of this require recusal?

II. Even a timely motion for reconsideration requires a "palpable defect" that would change the case's outcome. Kilpatrick's untimely motion rests on the meritless recusal argument cited above, the grant of a certificate of appealability in a different case where (unlike here) the defendant's *McDonnell* claims were preserved, and the same attacks on his trial attorney that this Court has rejected many times over. Should the Court reconsider its § 2255 order?

Controlling or Most Appropriate Authorities

28 U.S.C. § 455(a)

United States v. Dandy, 998 F.2d 1344 (6th Cir. 1993)

In re Complaint of Judicial Misconduct, 816 F.3d 1266 (9th Cir. 2016)

E.D. Mich. R. 7.1(h)

Davila v. Davis, 137 S. Ct. 2058 (2017)

Facts and Procedural History

Defendant Kwame Kilpatrick, the former mayor of Detroit, was convicted over six years ago of 24 federal corruption counts, including a RICO conspiracy, extortion, attempted extortion, bribery, mail fraud, wire fraud, false tax returns, and tax evasion. (R.277: Verdict Form, 2213–34). This Court sentenced him to 336 months in prison. (R.516: Kilpatrick Judgment, 16450). The Sixth Circuit affirmed Kilpatrick's convictions. *United States v. Kilpatrick*, 798 F.3d 365 (6th Cir. 2015). And just over a month ago, this Court denied Kilpatrick's motion to vacate under 28 U.S.C. § 2255 and denied him a certificate of appealability. (R.645: § 2255 Order, 18264–305).

Undeterred, Kilpatrick has now submitted two new motions and a handful of supplemental filings. The first motion demands that this Court recuse itself under 28 U.S.C. § 455(a) from making any "post-trial decisions currently pending." (R.649: Motion for Recusal, 18313–26). The second motion asks the Court to reconsider its § 2255 order. (R.648: Motion for Reconsideration, 18309–12; R.650: Exhibits, 18327–34; R.651: Statement of Law, 18335–38; R.652: Statement of Law, 18339–41; R.654: Addendum, 18343–45).

Argument

I. Even if Kilpatrick's unsworn allegations were taken as true, a wedding card to his trial attorney would not require recusal.

Nothing in Kilpatrick's latest filings establishes any basis for the Court to recuse itself from whatever decisions are left in this case. Having had past difficulties with sworn testimony (*see* PSR ¶ 133), Kilpatrick has not attached an affidavit or any other evidentiary support to his motion. Instead, in a 13-page series of unsworn paragraphs, Kilpatrick alleges that the Court is biased against him based on its "professional" and "personal" relationship with one of his trial attorneys, James Thomas. (R.649: Motion for Recusal, 18314, 18321).

Kilpatrick's accusations mostly parrot the conflict-of-interest arguments that the Court has repeatedly rejected. (*Id.*, 18313–25). The one exception is Kilpatrick's new allegation that the Court sent Thomas a "lovely card for [his] wedding." (*Id.*, 18316). Kilpatrick claims that he overheard Thomas thank the Court for sending him a wedding card, and that the Court then responded, "You are welcome, Jim." (*Id.*). This wedding card, in Kilpatrick's view, evinces the Court's outrageous "personal bias" in Thomas's favor, which now prevents the Court from

dispassionately resolving any "currently pending" ineffective-assistance or conflict-of-interest claims involving Thomas. (*Id.*, 18324).

Even by Kilpatrick's telling, he knew almost seven years ago about the allegations underlying this recusal claim. Yet he said nothing until now. This lengthy delay means that Kilpatrick has likely waived any recusal claim by failing to bring it earlier. *See Molina v. Rison*, 886 F.2d 1124, 1131 (9th Cir. 1989) ("It is well-established that a motion to disqualify or recuse a judge under 28 U.S.C. § 144 or § 455 must be made in a timely fashion."); *Willner v. Univ. of Kansas*, 848 F.2d 1023, 1028 (10th Cir. 1988) ("A motion to recuse under section 455(a) must be timely filed."); *accord United States v. Woodman*, 98-4527, 2000 WL 1234328, at *6 (6th Cir. Aug. 21, 2000); *In re Eagle-Picher Indus.*, 963 F.2d 855, 862–63 (6th Cir. 1992).

But even assuming that Kilpatrick's claim has not been waived, and even assuming that Kilpatrick is telling the truth, and even assuming that there are any pending decisions left for the Court to make, nothing in Kilpatrick's motion justifies recusal. Senate confirmation does not condemn a federal judge "to be a hermit removed from the world." *Carter v. W. Pub. Co.*, No. 99-11959, 1999 WL 994997, at *4 (11th Cir.

Nov. 1, 1999) (single-judge order). Judges are permitted (some might say encouraged) to engage in normal human behavior—to have "neighbors, friends and acquaintances, business and social relations, and be a part of [their] day and generation." *In re Complaint of Judicial Misconduct*, 816 F.3d 1266, 1268 (9th Cir. 2016). Otherwise, the judiciary would become a "juridical monastic order," a "strange" collection of "lifeless, friendless thing[s], entirely detached from the ordinary circumstances of everyday life." *Carter*, 1999 WL 994997, at *4, *6. Nobody wants that.

For this reason, the judicial disqualification statute requires recusal only if a judge's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). This is an objective standard; it does not hinge on Kilpatrick's "subjective view." *United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir. 1993). A judge need not recuse herself "simply because of unsupported, irrational, or highly tenuous speculation." *United States v. Cherry*, 330 F.3d 658, 665 (4th Cir. 2003). And although a judge must disqualify herself "when there is a close question" concerning impartiality, the judge "has an equally strong duty to sit where

disqualification is not required." *United States v. Angelus*, 258 F. App'x 840, 842 (6th Cir. 2007).

Thus, even when a judge has prior contact with a *party*, recusal is not required if the relationship "is 'merely that of an acquaintance.'" *Id.* at 843 (quoting *Dandy*, 998 F.2d at 1349). The judge must disqualify herself only if there is "'an intimate, personal relationship'" with the party "'or a relationship in which the judge would be obligated to [the] party.'" *Id.* (quoting *Dandy*, 998 F.2d at 1349).

When interacting with counsel, the recusal standard is similar. A judge is "not . . . expected" to recuse herself whenever she is "acquainted"—even "well-acquainted"— with counsel to a case. *Uni-Bond, Inc. v. National Steel Corp.*, No. 84-1278, 1985 WL 13391, at *3 (6th Cir. June 3, 1985). Even "friendship between a judge and a lawyer, or other participant in a trial, without more, does not require recusal." *In re Complaint of Judicial Misconduct*, 816 F.3d at 1268; *see also Bukstel v. Hand*, 644 F. App'x 110, 111 (3d Cir. 2016) ("Typically, a judge need not recuse merely because he or she is friends with an attorney in the case."). Otherwise, in districts where the bench and legal community are small, judges would need to disqualify themselves

in almost every case—an "unworkable" rule, to say the least. *Uni-Bond, Inc.*, 1985 WL 13391, at *3. So unless a judge has "an intimate, personal relationship" with the attorney, recusal is not required. *Dandy*, 998 F.2d at 1349.

A few examples prove the point. Recusal is not required when the attorney is the judge's next-door neighbor. *In re Complaint of Judicial Misconduct*, 816 F.3d at 1268. Nor when the attorney is the judge's former law clerk. *In re Mitan*, 579 F. App'x 67, 71 (3d Cir. 2014). Nor even when the judge has a picture of the former-law-clerk-turned-attorney kissing the judge on the cheek. *See Carter*, 1999 WL 994997, at *6 (citing *United States v. Corces*, 971 F. Supp. 545, 546 (M.D. Fla. 1997)).

Under that standard, Kilpatrick's allegations fall well short of mandating recusal. Most of Kilpatrick's dissatisfaction stems merely from his disagreement with the Court's rulings on his conflict-of-interest claims. But "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994). The Sixth Circuit's unanimous opinion, rejecting Kilpatrick's conflict claims on the merits, also fatally undermines his

argument that the Court's rulings were biased or unfair. *United States v. Kilpatrick*, 798 F.3d 365, 373–77 (6th Cir. 2015).

And Kilpatrick's new "wedding card" allegation, even if true, suggests only a professional acquaintanceship between the Court and Thomas. Wedding cards are a small and familiar way to congratulate new couples on their nuptials. They are a common pleasantry among neighbors, distant friends, professional colleagues, and other acquaintances—a far wider circle than just intimate friends and close family. And because sending a wedding card is so "common" and so widespread, it would not "appear to a knowledgeable observer as a sign of partiality." *Cherry*, 330 F.3d at 666. Indeed, if a simple wedding card were sufficient to mandate recusal, it would be tough to see how *any* judge could congratulate *any* attorney on *any* accomplishment—personal or professional—without then having to disqualify herself from all of the attorney's future cases. Kilpatrick's argument, in short, does not just fail the recusal standard; it has no limiting principle.

Kilpatrick's argument is also odd for another reason: he's contending not that the Court was biased in favor of the government's attorneys, but that the Court was biased in favor of *his* attorney. It is unusual for

a litigant to complain that a judge views his chosen counsel favorably. And even assuming that such an argument might support recusal in some extreme circumstances, the litigant must still demonstrate that the judge holds "a 'deep-seated favoritism'" toward his attorney "'that would make fair judgment impossible.'" *Mitan*, 579 F. App'x at 71 (quoting *Liteky*, 510 U.S. at 555). Kilpatrick cannot do that.

As further proof, look at the Court's conflict ruling. Thomas confirmed before trial here that any potential conflict of interest with O'Reilly Rancilio had been walled off and that he was capable and prepared to represent Kilpatrick. (R.203: Memorandum of Law, 1580–81, 1583–84; R.206: Tr., 1673; R.362: Tr., 9394–95, 9413–14). But Thomas also asked to be removed from the case. (R.362: Tr., 9395). If the Court were actually biased in Thomas's favor, it would have given him what he asked for and let him withdraw—not left him on a six-month trial with a client who has impugned his reputation at every moment since. Because the Court's ruling was "contrary to the expectation of a reasonable person" if the Court had actually "been biased in favor of [Thomas]," its ruling further confirms that recusal

here is unwarranted. *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 666 (8th Cir. 2003).

II. Kilpatrick's untimely motion does not warrant reconsideration of the Court's § 2255 order.

A. Kilpatrick's motion for reconsideration is untimely under Eastern District of Michigan Local Rule 7.1(h)(1).

Kilpatrick's motion for reconsideration is too late, and the Court can deny it on that ground alone. Kilpatrick, a former lawyer, has invoked Eastern District of Michigan Local Rule 7.1(h) as the procedural mechanism for seeking reconsideration here. (R.648: Motion for Reconsideration, 18309; *see also* R.650: Exhibits, 18327; R.651: Statement of Law, 18335; R.652: Statement of Law, 18339; R.654: Addendum, 18343). But a motion under Local Rule 7.1(h) "must be filed within 14 days after entry of the judgment or order" being challenged. E.D. Mich. R. 7.1(h)(1). Here, the Court's order and judgment denying Kilpatrick's § 2255 motion were both entered on March 19, 2019. (R.645: § 2255 Order, 18264–305; R.646: § 2255 Judgment, 18306). Kilpatrick filed his motion for reconsideration on April 9, 2019. (R.648: Motion for Reconsideration, 18309). That was a week too late. Even the

date listed on the face of Kilpatrick's motion (April 4, 2019) would have been too late. (*Id.*). So Kilpatrick's motion is untimely.

The Court should enforce that time limit. Although the time limit in Local Rule 7.1(h)(1) is not jurisdictional, it still qualifies as a "claim-processing rule" that should be enforced if the government has raised it. *See United States v. Gaytan-Garza*, 652 F.3d 680, 681 (6th Cir. 2011). The government has now raised it. The Court should therefore deny Kilpatrick's motion for reconsideration on that basis. *See United States v. Littles*, No. 14-20484, 2019 WL 1755225, at *1 (E.D. Mich. Apr. 19, 2019); *United States v. Clark*, No. 11-15179, 2012 WL 3945537, at *1 n.1 (E.D. Mich. Sept. 10, 2012).

B. Alternatively, if the Court were to reach the merits, nothing in Kilpatrick's motion supports reconsideration.

If Kilpatrick's motion were considered on the merits, it would still fail. Roughly speaking, Kilpatrick has raised three different arguments for reconsideration of the Court's § 2255 order. None of those arguments should carry the day, either alone or together.

First, Kilpatrick's recusal claim does not support reconsideration. The same reasons why this Court need not prospectively recuse itself, discussed above, also prevent Kilpatrick from obtaining retrospective

relief. The Court was not required to recuse itself *sua sponte* from presiding over Kilpatrick's trial.

Any recusal-based attack on Kilpatrick's convictions also faces two other barriers. One is that Kilpatrick is seeking to add a new claim after the Court's adverse decision on his § 2255 motion, and he does not meet the standard for doing so. *Clark v. United States*, 764 F.3d 653, 661–62 (6th Cir. 2014). The other is that Kilpatrick did not raise this recusal argument before or during trial, or on appeal, or, indeed, at any time before now. This means that Kilpatrick has procedurally defaulted his recusal claim. *Molina*, 886 F.2d at 1131–32; *United States v. Turek*, No. 11-29, 2015 WL 5838479, at *3 (E.D. Ky. Oct. 6, 2015); *United States v. Perry*, No. 12-07204, 2015 WL 5737962, at *5 (E.D. Ky. Sept. 30, 2015); *cf. Goward v. United States*, 569 F. App'x 408, 410–11 (6th Cir. 2014). And as with his other procedurally defaulted claims (*see* R.645: § 2255 Order, 18266–69), Kilpatrick has shown nothing here that would excuse his default.

Second, in seizing on the certificate of appealability that the Sixth Circuit recently granted for some of the *McDonnell* claims in *United States v. Dimora*, No. 18-4260 (6th Cir. Mar. 27, 2019), Kilpatrick only

highlights the weakness of his argument for similar relief here. (*See* R.652: Statement of Law, 18341; R.654: Addendum, 18343–44). In *Dimora*, the district court held that the defendant had *preserved*—not procedurally defaulted—his *McDonnell* claims. *Dimora v. United States*, No. 10-387, 2018 WL 5255121, at *7 (N.D. Ohio Oct. 22, 2018). Here, in contrast, Kilpatrick procedurally defaulted his *McDonnell* claims by failing to raise them at trial or on direct appeal. (*See* R.645: § 2255 Order, 18266–69). And Kilpatrick has never attempted to show the "cause" and "prejudice" or "actual innocence" that would excuse his default.

That distinction makes a difference. An unexcused procedural default is, by itself, a sufficient basis for denying a certificate of appealability. *See Davila v. Davis*, 137 S. Ct. 2058, 2063–64 (2017) (affirming the denial of a certificate of appealability where the defendant procedurally defaulted his jury-instruction claim); *Jackson v. United States*, No. 17-6518, 2018 WL 3048002, at *2 (6th Cir. Apr. 23, 2018) (denying a certificate of appealability where there was an unexcused procedural default). That is just as true for Kilpatrick's *McDonnell* claims as it is for any other claims.

Further, the reason Kilpatrick never made a *McDonnell*-like objection at trial or on appeal is that his extortion involved only the kind of "official acts" contemplated by *McDonnell*. As this Court has explained, "each extortion conviction" here "was based upon the approval of a different DWSD contract"—the epitome of "a formal exercise of governmental power constituting an official act under *McDonnell*." (R.645: § 2255 Order, 18272). *See United States v. Pinson*, 860 F.3d 152, 168–69 (4th Cir. 2017); *United States v. Repak*, 852 F.3d 230, 253–54 (3d Cir. 2017). That is why Kilpatrick never contested this issue at trial. It is also why he cannot seriously contest it now.

Third, Kilpatrick's remaining arguments merely rehash the conflict-of-interest and ineffective-assistance claims that this Court has exhaustively reviewed and denied on the merits. (R.645: § 2255 Order, 18274–93). Motions for reconsideration may not "merely present the same issues ruled upon by the Court, either expressly or by reasonable implication." E.D. Mich. R. 7.1(h)(3). Yet that is what Kilpatrick has done. Those arguments should therefore be rejected as well.

Conclusion

Kilpatrick's motions should be denied.

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Dated: May 3, 2019

Certificate of Service

I certify that on May 3, 2019, I electronically filed this response with the Clerk of the Court using the ECF system, which will send notification of the filing to all users of record. I further certify that I have mailed the response by United States Postal Service to the following non-ECF participant:

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